S.B. CIVIL WRIT PETITION NO.5375/2005

Jagdamba Grah Nirman Sahkari Samiti Ltd.
vs.
Jodhan Real Estate Development Company Pvt. Ltd. & others.

Date : 20.9.2005

HON'BLE MR. PRAKASH TATIA, J.

Mr. OP Mehta, for the petitioner.
Mr. VD Kalla, for the respondent no.1.

- - - - -

Heard learned counsel for the parties.

The petitioner is aggrieved against the order dated 31.8.2005 by which the petitioner's application under the heading “Order 39 Rule 7 CPC” was dismissed by the Additional District Judge NO.2, Jodhpur.

This Court has no hesitation in observing that the learned trial judge namely, Additional District Judge No.2, Jodhpur either was not knowing the law on the subject of appointment of Commissioner or if he was knowing Law on the subject, then the position is much more grave.

On an application for appointment of Commissioner, the learned trial judge recorded findings which are in para no.3 of the impugned order. Para no.3 of the impugned order reads as under :-

" 3- पक्षकारान की बहस सुनकर पत्रावली का अवलोकन किया गया । दिनांक 18.06.2005 के अवार्ड से आरबीट्रेटर द्वारा कुल 58900 वर्ग मीटर भूमि पर जहां 106 मकान निर्मित हो गये है, उन मकानों की स्थिति बाबत् प्रार्थी व अप्रार्थी को जो निर्देश दिये है, उनकी पालना बाबत् दोनों पक्ष यथास्थिति रखी हुई होना बताते है । इस अवार्ड के माध्यम से जो खुली जमीन अप्रार्थी जोधाणा रीयल एस्टेट को प्राप्त हुई, उस जमीन को वकील अप्रार्थी विभिन्न व्यक्तियों के नाम जरिये पंजीबद्ध बेचान निस्तारित कर देना बताते है, जो समस्त क्रेता इस प्रकरण में पक्षकार नहीं है । वकील अप्रार्थी का कथन है कि खुली पड़ी जमीन सीलिंग कानून समाप्त हो जाने से जोधाणा रीयल एस्टेट की सम्पति थी, जिस सम्पति को प्राप्त करने का या जिस सम्पति पर यथास्थिति बनाये रखवाने का गृह निर्माण सहकारी समिति को कोई अधिकार ही नहीं है । माननीय जिला न्यायाधीश महोदय अवकाश पर हे तथा कमीशनर की नियुक्ति मौका मुआयना हेतु की जाय या नहीं केवल इस बिन्दु पर ही इस न्यायालय को आवश्यक प्रकृति का आवेदन होने से विचारण कर आदेश पारित करना है । यह स्थिति निर्विवाद है कि दिनांक 18.06.2005 के अवार्ड को प्रार्थी ने इस न्यायालय में चुनौती दी है । यह स्थिति भी निर्विवाद है कि जमीन का मालिकाना हक जोधाणा रीयल एस्टेट डवलपमेण्ट लिमिटेड अप्रार्थी का है तथा प्रार्थी एक संविदा के तहत गृह निर्माण करने वाली सहकारी समिति है जिसने वर्ष 1984 में जो कार्य प्रारम्भ किया, वह वर्तमान वर्ष 2005 तक अर्थात 21 वर्षो से जारी है (1) यह माने जाने योग्य नहीं है । (2) प्रार्थी द्वारा प्रस्तुत धारा 34 के आवेदन पत्र से केवल पंचाटे के अवार्ड को महाराजा गजसिंह के प्रभाव में आकर दिया गया अवार्ड बताते हुए एकतरफा अवार्ड को अपास्त करने की प्रार्थना की है ।

(3) अप्रार्थी इस अवार्ड के तहत अग्रिम कार्यवाही भूमि के निस्तारण की कर चुका है । (4) प्रकरण के तथ्यों से स्पष्ट है कि शहरी भूमि के अधिग्रहण को सीलिंग व रेगुलेशन एक्ट 1976 के प्रभाव से बचाने के लिये अप्रार्थी ने प्रार्थी के पक्ष में इकरार कर गरीबों को आवास बनाकर आवंटित करने की योजना बनाई थी तथा 21 वर्षो की अवधि में न तो कोई गरीब उपलब्ध हुआ, न ही उन गरीबों को सारी भूमि पर आवास बनाकर दिये गये तथा जब 1976 का यह विधान वापस ले लिया गया, तब स्वाभाविक तौर पर भूमि के मालिकाना हक अप्रार्थी पक्ष को वापस प्राप्त हो गये । दोनों पक्षों के मध्य विवादित संविदा दिनांक 09.06.83 के अवलोकन पर पाया गया कि जोधाणा रीयल एस्टेट के नियंत्रण में व संविदा के शर्तो के अन्तर्गत आबादी भूमि का विकास करने तथा उस भूमि पर आवासीय मकान बनाने के लिये प्रार्थी को अधिकृत किया गया था । समिति को पांच रूपये वर्ग गज के रूपये जमा कराने थे तथा भूमि का विकास कर निर्माण कार्य करना था । भूमि की कीमत व निर्माण का 15 प्रतिशत अदा कर जिन व्यक्तियों ने मकान बनाया है, उनके पक्ष में बेचान पत्र निष्पादित होने थे, (5) लेकिन खेद का विषय है कि दिनांक 09.06.83 की संविदा इकरार पालना प्रार्थी समिति ने नहीं की, न ही इस संविदा के अअनुरूप 106 निर्मित मकानों को मकानों के धारकों को कोई मालिकाना हक प्राप्त हुआ । खैर जो भी स्थिति हो, क्या इस न्यायालय के आदेश दिनांक 20.08.2005 की भावना के तहत 106 निर्मित भवनों के अलावा बकाया खाली पड़ी जमीन के वर्तमान मालिकाना हक की स्थिति व वर्तमान में उस जमीन पर जोधाणा रीयल एस्टेट से जमीन खरीदने वाले क्रेताओं का निर्माण कार्य रोकने की मन्शा इस यथास्थिति आदेश में है या नहीं यह बिन्दु तय किया जाना है । वकील

अप्रार्थी ने पंचाट के तहत यथास्थिति बनाये रखने की सहमति दी तथा इस न्यायालय ने भी अवार्ड के तहत विवादग्रस्त सम्पति की यथास्थिति बनाये रखने का आदेश दिया है । (6) इसका तात्पर्य यह है कि विवादित सम्पति के मालिकाना हक की यथास्थिति दिनांक 20.08.05 की तिथि के अनुरूप रखी जाए तथा अवार्ड के तहत आने वाली सम्पति 58900 वर्ग मीटर है, उस भूमि पर जोधाणा रीयल एस्टेट से जमीन खरीद चुके लोगों को यथास्थिति बनाये रखने के लिये पाबन्द किया जा सकता है या नहीं तथा मौका मुआयना उस यथास्थिति के प्रयोजन से करवाया जाना है या नहीं इस पर माननीय जिला न्यायाधीश जी ने न तो विवेचन ही किया है न ही ऐसा कोई आदेश दिनांक 20.08.2005 में दिया है । (7) मौके की यथास्थिति कब्जे व निर्माण बाबत यथावत बनाये रखने का आदेश दिनांक 20.08.2005 का नहीं है । अत: अवार्ड के तहत जो मौके की स्थिति है, उस स्थति को दोनों पक्ष यथावत बनाये रखें । (8) इस यथास्थिति आदेश में जोधाणा रीयल एस्टेट की खुली पड़ी जमीन पर कोई निर्माण न हो, या यथास्थिति रखी जाए, ऐसा अभिप्राय इस आदेश से नहीं निकाला जा सकता है । अत: कमीशनर नियुक्ति हेतु जो प्रार्थना पत्र प्रार्थी ने प्रस्तुत किया है, उसका कोई प्रयोजन इस स्टेज पर स्पष्ट नहीं होता । मूल प्रार्थना पत्र में प्रार्थी ने संविदा इकरार दिनांक 09.06.83 के माध्यम से (9) अप्रार्थी की जमीन का कब्जा होना बताया है, परन्तु समस्त भूमि पर कब्जा या मालिकाना हक प्रार्थी समिति को प्राप्त हो जाने का उल्लेख दिनांक 09.06.83 की संविदा में नहीं है । अत: प्रार्थी समिति का 106 निर्मित मकानों के अलावा शेष भूमि का मौका मुआयना करवाने या कमीशनर की रिपोर्ट पत्रावली पर लिये जाने का औचित्य यथास्थिति आदेश के तहत किसी भी प्रकार से नहीं रहता । वकील प्रार्थी

द्वारा प्रस्तुत ए आई आर 1988 सुप्रीम कोर्ट पेज 127 पर निर्णित भारत कोकिंम कोल बनाम बिहार राज्य के निर्णय में माननीय उच्च न्यायालय द्वारा रिट याचिका में यथास्थिति रखने का आदेश पारित किया गया, उस आदेश के बावजूद कोयला खदान क्षैत्र से सामग्री हटाया जाना यथास्थिति आदेश का उल्लंघन माना गया है । ए आई आर 1989 मद्रास पेज 73 पर निर्णित डी एल भट्ट बनाम ललिथा के निर्णय में यह निर्धारित किया गया है कि न्यायालय यथास्थिति आदेश पारित करे उस समय कब्जे की क्या स्थिति है, यह तथ्य पत्रावली पर लेना आवश्यक बताया गया है । (10) इस प्रकरण में कब्जे की स्थिति यथावत रखने की न प्रार्थी की प्रार्थना थी, न ही अप्रार्थी ने कब्जे की यथास्थिति रखने की सहमति दी है । कब्जा व मालिकाना हक एक दूसरे के पूरक है, जिस भूमि पर प्रार्थी समिति ने भवन का निर्माण नहीं किया, वहां संविदा अग्रसर नहीं हुई, व सीलिंग कानून समाप्त होते ही उस भूमि के मालिकाना हक अप्रार्थी को मिल गये । (11) अत: कब्जे व मालिकाना हक के अभाव में प्रार्थी ने न तो कब्जे बाबत् यथास्थिति बनाये रखने की राहत चाही, न ही इस हेतु आदेश से पूर्व कोई आवेदन पेश किया, न ही आदेश के समय ही न्यायालय से स्थिति पत्रावली पर लाने की प्रार्थना की है । जो भी यथास्थिति है, वह पंचाट के निर्णय दिनांक 18.06.2005 के अधीन है, उस यथास्थिति का उल्लंघन होने पर प्रार्थी पक्ष वैधानिक कार्यवाही कर सकता है । उपरोक्त समग्र विवेचन केवल आदेश 39 नियम 7 सिविल प्रक्रिया संहिता के प्रार्थना पत्र के निस्तारण के प्रयोजन से किया गया विवेचन माना जाएगा । प्रथमदृष्टया इस विवेचन का इस प्रकरण की अन्य किसी कार्यवाही पर कोई प्रभाव नहीं होगा ।"

For the convenience, the relevant portion in the impugned order has been underlined and numbers have been marked in the order so that the findings recorded by the trial judge in such proceedings may be clear.

This is very unfortunate that the learned trial judge by exceeding his all jurisdiction and by breaking all the barriers of law after recording those findings as mentioned above in last observed that whatever has been observed on the points in the impugned order, they are only for the purpose of deciding the application under Order 39 Rule 7 CPC and it will not affect any other proceedings. This observation is only desperate effort of the learned Judge and to take shelter behind this observation. The findings appear to have been recorded purposefully. It appears and as observed above, the court below, while considering the application for appointment of Commissioner, could not have gone into all those facts which were mentioned and which were considered and on which, the findings have been recorded by the court below.

It will be worthwhile to mention a few facts only which will show that under what circumstances, the impugned order was passed by the court below. Because of dispute between the parties, by the order of this Court dated 12.9.2003 in SB Civil Misc. Arbitration Application No.20/2003, sole arbitrator was appointed who passed the final award on 18.6.2005. The said award was challenged by the petitioner

by filing objection petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act of 1996'). An application for interim injunction under Section 9 of the Act of 1996 was also submitted by the petitioner on which notices were issued to the respondents and on 20.8.2005, learned counsel for the respondent appeared and gave his consent that the interim order may be passed. Learned counsel for the respondent before the trial court stated that the respondents are ready to maintain status quo with respect to the subject property under the award. The trial court consequently passed the order directing to maintain the status quo with respect to the said property till the decision of the main proceedings obviously under Section 34 of the Act of 1996. On 22.8.2005, an application was submitted by the petitioner seeking appointment of Commissioner. The application is brief and copy of which is placed on record by the petitioner as Annexure-24. In this application, merely it is stated that the Court has passed the interim order on 20.8.2005 and the next date is 29.8.2005. Despite this interim order, the respondents are raising construction over the disputed property. The petitioner prayed that in this situation, the Commissioner may be appointed so that the actual site position may come on the record of the Court.

The said application was replied by the respondent and it was stated that the notice was served upon the counsel for the respondent and the counsel for the respondent is

not in a position to contact his client and in fact, the notice should have been served upon the respondent. It is submitted that the petitioner wants to create some evidence and for that purpose, he has moved application for appointment of the Commissioner. It is also stated that the petitioner has not disclosed how the position is being changed by the respondent. In absence of the particulars in the application, the respondent will not be able to give proper reply to the application filed by the petitioner.

The thrust of contention was that the counsel for the respondent was not in position to contact his client and, therefore, he cannot file the reply. The Court did not appoint the Commissioner or reject the application of the petitioner forthwith on the ground of non-disclosure of facts in the application by the petitioner or on the ground that because of lack of particulars, the Commissioner cannot be appointed. The matter was adjourned and ultimately, on 29.8.2005, learned counsel for the respondent before the trial court submitted that reply filed by them on 22.8.2005 may be treated to be reply to the application filed by the petitioner under Order 39 Rule 7 CPC. On these facts, after hearing learned counsel for the parties, the court below passed the impugned order dated 31.8.2005.

Learned counsel for the petitioner vehemently submitted that the trial court exceeded its jurisdiction and has passed the impugned order in a manner so as the trial court

is deciding the dispute between the parties either finally or deciding application for injunction or hearing appeal against the order of learned District Judge, Jodhpur dated 20.8.2005 and the court below recorded not only findings on various contentious issues but even recorded wrong findings and also decided the issues in favour of the non-petitioner which are subject matter of the objections under Section 34 of the Act of 1996. Learned counsel for the petitioner placed on record as many as 28 relevant documents which made the writ petition running in total 342 pages.

It will be relevant to mention here at this juncture that the order under challenge is the order which was passed under Order 39 Rule 7 CPC and the dispute between the parties with respect to the appointment of the Commissioner only resulting into such a bulky writ petition and this happened because of amendment made in Civil Procedure Code particularly in Section 115 CPC. In absence of those material, the petitioner must have thought that he may not be allowed to refer the documents which have not been submitted before the Court in writ petition. Be it as it may be. The fact remains is that the court below even went to the extent of commenting upon the order dated 20.8.2005 which was passed by the learned District Judge which was neither under challenge nor was under consideration as none of the parties had grievance against the said order. The learned judge concerned got this opportunity because of the fact that the learned District Judge was on leave and the matter went to the learned

Additional District Judge No.2, Jodhpur because of the reason that the petitioner insisted that it is matter of urgency and the Commissioner be appointed. At this time, if the court below had applied its mind to all the facts with respect to the merits of the case, then the trial court should have first looked into the relevant provisions of the Act of 1996 or if escaped its notice, then atleast in the relevant provisions of Order 39 Rule 7 CPC under which the application was filed and the order was sought by the petitioner.

It will be worthwhile to mention here that learned counsel for the respondent before this Court contended that the application filed by the petitioner should have been filed under Section 9 of the Act of 1996 and in that case, if the order would have been passed by the court below, the party would have got an opportunity to challenge the order by filing appeal. If it is so, it happened because the trial court did not look into the relevant provisions of law in which the order was sought and was passed. Apart from the fact that this Court is of the firm view that in either case, the court below should not have recorded the findings even in the name of prima-facie findings and should have looked into only the relevant facts and the law which was relevant for the purpose of deciding the application. Even if before the court below, any of the parties argued, which according to the learned counsel for the petitioner, in fact did not argued and according to learned counsel for the respondent, all the facts were

referred by the parties and the case was argued even then, it was the duty of the court below to control the argument and to confine itself to the jurisdiction available to the Court for the purpose of deciding the application. If the Court had not controlled the arguments of the parties, then the court below committed serious error and further committed error of law while passing the order.

As observed above, this Court is of the opinion that the trial court, if without knowing the scope, recorded the findings in para no.3 of the impugned order, then it is not only bad but also dangerous position and if the court below was knowing the scope of the proceedings and even then, he passed the order, he has caused serious damage.

According to learned counsel for the respondent, since the petitioner did not disclose where rather at what location, the respondents are raising construction, therefore, the application was liable to be rejected. Such could have been an argument before the court below but that did not prevail upon the court below. If the argument of the learned counsel for the respondent is accepted, then also it appears that the respondent wants to save the impugned order on the grounds which was not considered by the court below while passing the order dated 31.8.2005. Therefore, on the application filed by the petitioner titled Under Order 39 Rule 7 CPC, the prayer of the petitioner was for appointment of Commissioner so that the actual factual position may come on the record. Neither the

interlocutory order of injunction or appointment of the receiver were prayed by the petitioner nor that relief was even orally sought by the petitioner. In such circumstances, the court below only rejected the petitioner's application on the grounds which are not sustainable in the eye of law, therefore, the order deserves to be set aside.

In view of the above, this writ petition is allowed, the order dated 31.8.2005 is set aside and the court below is directed to decide forthwith the application of the petitioner filed under Order 39 Rule 7 CPC in accordance with law and looking to the facts of the case within the jurisdiction available to the Court under the relevant provisions of law for appointment of Commissioner uninfluenced by the title of the application because of the reason that the title of the application cannot be a ground for rejection of the application.

Both the learned counsel for the parties requested this Court for fixing the date for presence of the parties. Accordingly, both the parties are directed to appear before the trial court on 22.9.2005.

(PRAKASH TATIA), J.

S.Phophaliya